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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-299

GENE HENDERSON, doing business as Henderson Plumbing and Heating Company,
Petitioner,

vs.

PLUMBERS' LOCAL NO. 8 OF THE AMERICAN FEDERATION OF LABOR, an unincorporated labor organization, and WALTER CROSS, JACK MEANY, JR., LOUIS STINE, SETH SLOCUM, JOHN LIND, FRANK W. FISHER, WILLIAM AKIN, R. P. FLAIGLE, JOHN GRINDINER, R. J. ERISMAN, ARNOLD VAN TRUMP, BERNARD T. HENEMAN and EVERETT WILLIAMS,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The Opinion of the Missouri Supreme Court, as yet unreported, appears in Petitioner's Appendix at pp. 2-9. No question is raised as to the finality of that Decision.

JURISDICTION

Jurisdiction of this court is invoked under 28 USC Sec. 1257 (3) and Rule 19 (a) of this Court.

QUESTION PRESENTED

Although presented somewhat obtusely in the Petition in three different forms, the simple question is whether a state court is without jurisdiction to award damages because of peaceful picketing or to grant an injunction prohibiting peaceful picketing of an employer engaged in interstate commerce who maintains substandard working conditions which picketing truthfully discloses the substandard working conditions complained of where such employer has filed charges against the labor organization with the National Labor Relations Board under the Labor-Management Relations Act, and said Board accepted said charges, investigated them, and then dismissed them for lack of merit.

FEDERAL STATUTE INVOLVED

The determination of the question involves the interpretation and application of the Labor Management Relations Act of 1947, 29 USC Section 141 et seq., the pertinent portions of which are set forth in the Appendix to Petitioner's Brief at pages 51-54.

STATEMENT OF THE CASE

Respondent Plumbers Local 8 of the American Federation of Labor is a labor organization engaged in repsenting craft employees engaged in the plumbing industry

in the Greater Kansas City Area. Petitioner is an employer doing business in Kansas and Missouri employing plumbers. He is a member of a multi-employer association which has a contract with District 50 of the United Mine Workers[1]. Respondents notified Petitioner by Registered Mail that they were informed that Petitioner did not provide his employees with all of the benefits which the union had established in the area. Petitioner did not respond. Respondents then placed a picket banner on Petitioner's projects complaining of the substandard conditions. The banner stated that employees of Petitioner "do not receive all of the benefits such as pensions, health and welfare plans, and other advantages which have been established in this area by Plumbers Local No. 8 AFL-CIO. We are not asking for recognition nor do we desire to represent their employees and we have no dispute with any other employer." See Petitioner's Appendix p. 3.

Employees of the Petitioner at the time of the picketing testified against Petitioner in the State Court, and stated that the facts asserted on the banner were truthful. They testified they received no pensions, that no health and welfare programs were maintained, that they did not receive overtime for work in excess of 40 hours per week, and that they did not receive show-up time, travel time, premium time, or holiday pay. Except for dis-

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1. This contract is unusual for although it sets forth certain wage rates it contains a provision in Article V Section 3 that if a "wage increase and/or a fringe benefit is granted or given to the *organized* workers in the Greater Kansas City Area engaged in the crafts trades or classifications listed in Appendix A of this Agreement, then such wages and/or fringe benefits shall be given by the employer to the employees covered under this agreement * * *." In a real sense, Respondent, in bargaining with other employers establishes the rates of pay and fringe benefits of employees of the Petitioner. This provision is contained in Article V Section 3 of Petitioner's Exhibit 1.

puting his employees' testimony concerning his failure to pay overtime to his employees, Petitioner did not deny the existence of the other substandard conditions and that he did not meet the working conditions established by Respondent in these respects. Although Petitioner repeatedly asserts in his brief that his employees received greater take home pay he ignores entirely the contrary evidence by his employees.

A number of charges were filed with the National Labor Relations Board including one filed by the Petitioner in which he alleged that the picketing was unlawful, being an unfair labor practice affecting commerce within the meaning of Sections 8(b) 7(A) and (C) of the Labor Management Relations Act. The Regional Director accepted the charges, investigated them and then refused on October 31, 1963, to issue a complaint for the reason that "there is insufficient evidence that the charged Party's picketing is for an object proscribed by Section 8(b) (7) of the Act." Petitioner did not appeal this finding.

After failing to secure the relief he desired from the National Labor Relations Board, Petitioner then filed a suit for damages and for an injunction in the state court based upon the same facts contained in the charge filed before the National Labor Relations Board. The lower court granted the injunctive relief and awarded damages in the amount of $43,672.00. On appeal, the Supreme Court of Missouri unanimously reversed, holding that substandard picketing is an activity arguably subject either to Section 7 or 8 of the National Labor Relations Act and that, therefore, the subject matter had been pre-empted by Section 160(a) of the National Labor Relations Act and that the state court was without jurisdiction to grant the injunction or award damages.

ARGUMENT

The Supreme Court Should Deny the Writ for the Reason That the Decision of the Supreme Court Is Completely in Harmony with the Decisions of the United States Supreme Court and Therefore Petitioner's Writ Does Not Meet the Standard Set Forth under 28 USC Sec. 1257(3) and Rule 19a of the Rules of the Supreme Court.

The Supreme Court of Missouri in its opinion carefully considered the decision of the United States Supreme Court, quoting from *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245; *ILA-Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 90 S. Ct. 872; and *Construction and General Laborers Union* v. *Curry*, 371 U.S. 542.

In addition, Respondent cited to the Missouri Supreme Court the following cases, all of which support the ultimate decision of that court:

Garner v. *Teamsters Union*, 346 U.S. 485;
Weber v. *Anheuser Busch*, 348 U.S. 468;
IBEW Local 1264 v. *Broadcast Service of Mobile*, 379 U.S. 812.

In his brief before the state court and in his brief before this court Petitioner does not cite a single case of this court which is inconsistent with the holding of the Supreme Court of Missouri which is presently subject to this Petition. The only decisions of this court which are cited by petitioner and which relate directly to the doctrine of federal pre-emption hold that Congress in enacting the National Labor Relations Act granted exclusive authority over disputes of this character to the National

Labor Relations Board and by virtue of that delegation the states were ousted of jurisdiction over the subject matter. This is precisely what the Missouri Supreme Court held. These holdings are in complete harmony with the Decision of the Missouri Supreme Court in this matter and hence no Writ of Certiorari should issue.

Petitioner appears to rely almost exclusively on the argument that this case is not subject to the doctrine of federal pre-emption because Respondent was not the recognized bargaining representative of his employees and that, therefore, there was no labor dispute. His argument overlooks the case of *ILA* v. *Ariadne Shipping Co.*, supra, in which this court reversed a Florida Court's holding that substandard picketing did not involve a "labor dispute" and found the doctrine of federal pre-emption does apply to such conduct. It similarly overlooks the decision of this court in *Weber* v. *Anheuser-Busch,* supra, in which an identical argument was rejected. His argument also overlooks the definition of a labor dispute as contained in Section 152(9) of the National Labor Relations Act which is as follows:

> "The term labor, dispute includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee."

The Supreme Court of Missouri fully recognized Petitioner's failure to recognize and understand the holdings of this court and the statutes involved and correctly applied the law in complete harmony with the decisions of this court. Since the decision of the Supreme Court of Missouri sought to be reviewed neither decided a federal

question of substance not heretofore determined by this Court, nor decided such a question in a way probably not in accord with applicable decisions of this court within the meaning of Rule 19(a) of this Court, the present petition is quite obviously without merit.

CONCLUSION

For the reasons above stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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